Case No. 83-6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CARROLL D. BESADNY, ET AL.,
Appellants,

v.

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.,
Respondents.

STATE OF WISCONSIN, a sovereign state, and SAWYER COUNTY, WISCONSIN,
Appellants,

v.

UNITED STATES OF AMERICA,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPELLANTS' BRIEF IN OPPOSITION TO SOLICITOR GENERAL'S MOTION TO DISMISS IN PART OR AFFIRM IN PART

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I. The Motion To Dismiss In Part Should Be Denied.

The Solicitor General (hereinafter, "the United States") seeks dismissal of the appeal numbered 79-1014 in the court of appeals, *United States vs. Wisconsin, et al.* (hereinafter, "*Ben Ruby*"), on the theory that the case was not

properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. § 1254(2). The motion essentially argues that the appellants (hereinafter, "the State") were and are not aggrieved by the *Ben Ruby* decision, and that the State prevailed on all issues in that case.

In the Seventh Circuit and in this Court, the State is aggrieved by the district court's and court of appeals' holdings that the 1850 Executive Order was invalid, and did not revoke the Chippewa's reserved rights of use and occupancy. A decision and judgment may be ultimately favorable to a party, but contain a finding which seriously damages, or potentially damages, the party. *Moore's Federal Practice* articulates the issue: "Suppose, however, that the judgment gives the party the full relief which he has asked for, the entire sum claimed, say, ... but contains a finding which is adverse to him. May he appeal from the adverse finding?" *Moore's Federal Practice* (hereinafter, "*Moore's*"), Vol. 9, par. 203.06, pages 3-23 to 3-24. The treatise first proposes that a finding is not truly "adverse" unless it can form the basis for collateral estoppel in subsequent litigation, and continues:

> Because, in the general view, a finding can form the basis for collateral estoppel only if it is necessary to the judgment, and because a finding adverse to an otherwise all-prevailing party will rarely

> be necessary to the judgment, it is broadly stated that a party cannot appeal from a judgment entirely favorable to him. But not all courts agree that only a finding necessary to the judgment may form the basis for collateral estoppel. Perhaps for that reason the Supreme Court has held that a successful party is entitled to appeal from a decree which contains an unnecessary adverse finding to the extent of seeking reformation of the decree. The Fifth Circuit has gone further.

Id., page 3-24, footnotes omitted.

This Court has held, in a case also cited by the United States, that an appeal by a prevailing party may be permitted from an adverse ruling which is collateral to the judgement on the merits. The appellant must, however, retain such a stake in the appeal as to satisfy the requirements of Article III of the Constitution. *Deposit Guaranty Nat. Bank, Etc. v. Roper*, 445 U.S. 326, 334 (1980). In another case also cited by the United States, this Court upheld a "prevailing" party's right to have a decree reformed, to eliminate an unfavorable finding collateral to the judgment. *Electrical Fittings Corp., et al. v. Thomas & Betts Co., et al.*, 307 U.S. 241, 242 (1939).

The State's position in the Seventh Circuit is, alternatively, aptly described in *Moore's* as "conditionally aggrieved." *Moore's* Vol. 9, par.

203.06, page 3-25. Such a party is not aggrieved unless and until an appeal is taken by another. When the Lac Courte Oreilles (hereinafter, "LCO") Band appealed the *LCO Band vs. Voigt* decision to the Seventh Circuit, the district court's invalidation of the 1850 Executive Order (in both *Ben Ruby* and *LCO Band*) became far more menacing to the State. The State thus argued explicitly that, if the district court's ultimate ruling on the effect of the 1854 Treaty were reversed, the State was most clearly aggrieved by the Executive Order ruling. If the district or appeals courts had construed the Order as the State requested, The Chippewa's reserved use and occupancy rights would have been held revoked by express action of the Order, and not by implicit operation of the 1854 Treaty. To dismiss the State's cross-appeal would have deprived the State of a fair opportunity to challenge a most damaging ruling.[1/]

1/ The Executive Order ruling was damaging to the State, regardless of any appeals by the Tribe or the United States. Invalidation of the Order changed the transactions of the 1854 Treaty from a grant of lands, from the United States to tribes who no longer had any rights whatsoever in Wisconsin, to a reservation by the Chippewa of continuing rights. By sole virtue of that conversion, the LCO Band now arguably fits within the *United States vs. Winans*, 198 U.S. 371, 381 (1905), rule of construction, that the 1854 Treaty must be seen as a grant of rights from the Indians, and a reservation of those rights not (footnote continued)

If the State's cross-appeal in *Ben Ruby* is to be dismissed solely for lack of a direct appeal by the United States, the *Ben Ruby* decision should be remanded, as in the *Electrical Fittings* case, for deletion of the damaging and unnecessary invalidation of the 1850 Executive Order.

II. The Motion To Affirm In Part Should Be Denied.

The United States argues that the 1850 Executive Order was invalid because it allegedly was not enforced. The factual premise of that argument is incorrect, as published reports in the record of this case indicate that some 3,000 out of 5,000 Chippewa (J.S.App. 67a) were removed to Minnesota (J.S.App. 72a-74a). However, this Court need not descend into that factual dispute, because the district court disposed of that argument appropriately on purely legal grounds. (J.S.App. 122a-123a.) The court reasoned that, if the order was valid and if it was not repealed, "it terminated the Indians' treaty right of permissive occupation. Whether the Indians actually complied with the order does not affect its legal status." (J.S.App. 122a, n.17) Acknowledging the Wisconsin Supreme Court's reference to the Order in *State vs. Gurnoe*, 53 Wis. 2d 390, 406-07, 192 N.W.2d 892 (1972), the district court "respectfully

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granted. That ruling will undoubtedly be cited against the State, in other cases.

disagree[d]" with the state court's reasoning, and noted that the *Gurnoe* reference was dictum anyway. (J.S.App. 123a, n.17). The position advanced by the United States invites anarchy, if mere disobedience can nullify orders and laws.

The argument of the United States concerning the LCO Band's economic circumstances and post-treaty activities would divert this Court into factual disputes which miss the point of the legal issues pressed by the State. The Seventh Circuit gave the highest possible legal standing, ordinarily reserved for rights intended to be permanent, to rights which both parties had to understand as temporary. The court took a case (*U.S. vs. Winans*) which established only that rights of use can survive on patented lands, independent of rights of occupancy, and effectively converted it into a presumption that hunting and fishing rights are not incidents of occupancy, but separate rights requiring separate, express revocation. The court's holdings on issue after issue demonstrate a contortion of Indian treaty interpretation rules that violates precedent, logic and reason. Finally, as noted before (J.S. 26), the court's refusal to consider the actual treaty language defining the rights casts profound doubt on the premise that rights are defined most basically by the document(s) creating or confirming them.

The United States' arguments regarding prematurity of this case (Motion p. 16) are addressed at pages one to four of our brief

in opposition to the tribe's motion to dismiss or affirm. We therefore request that the pending motions be denied and the case set for briefing and argument.

Respectfully submitted,

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